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TAN KAH KHIAM

v.

LIEW CHIN CHUAN & ANOR

B

COURT OF APPEAL, PUTRAJAYA

GOPAL SRI RAM JCA

HASHIM YUSOFF JCA

AZMEL MAAMOR JCA

[CIVIL APPEAL NO: W-02-678-2001]

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31 JULY 2006

CIVIL PROCEDURE: Trial - Procedure - Application by plaintiff to reopen case - Criteria to be satisfied - Exercise of discretion by trial judge - Whether a reasonable tribunal would have proceeded to deal with plaintiff's application before defendants began defence - Interests of justice - Whether interference by appellate court warranted - Whether plaintiff suffered procedural injustice

TORT: Defamation - Libel - Claim by plaintiff for damages - Whether words "tea money" in article published in Chinese language capable of bearing a defamatory meaning - Whether there was sufficient proof that those words had been attributed to plaintiff

This was an appeal by the plaintiff against the judgment of the High Court dismissing his claim for damages for an alleged libel committed on him by the defendants. The defendants had published an article about the plaintiff, a newspaper vendor, in the Chinese language which, according to the plaintiff, alleged that he had asked for "tea money" to distribute the second defendant's newspaper. The plaintiff said that it was defamatory of him and brought an action claiming damages for libel. At the trial, the plaintiff called his evidence and then closed his case, without calling a witness to prove the contents of the impugned article in the language of the court *ie*, either the English language or Bahasa Malaysia. Realising his error, the plaintiff applied to reopen the case. The defendants, however, suggested that they should be permitted to open, present their evidence and then close their case and that the plaintiff should then file a formal motion to reopen his case. Both the plaintiff and the court surprisingly accepted this suggestion, not realising the serious injustice that the plaintiff was bound to suffer. It meant that the plaintiff would be precluded from putting his case on the true meaning of the words

“tea money” to the defendants’ witnesses, which was precisely what happened. On each occasion that the plaintiff asked about the defamatory meaning of the words appearing in the article, the defendants raised an objection that was upheld by the trial judge. However, the plaintiff did manage, during cross examination, to obtain an admission from the defendants’ witness that the plaintiff had asked for “tea money”. At the close of the plaintiff’s case, his counsel applied by way of a formal notice of motion to reopen his client’s case and to call the translator to formally prove the contents of the impugned article. The defendants opposed this application and the learned judge dismissed it without giving any reasons. The defendants’ argument, which they repeated before this court, was that a plaintiff who wishes to reopen his case must satisfy the three conditions laid down by Denning LJ in *Ladd v. Marshall*.

Held (allowing the appeal and ordering a retrial)
Per Gopal Sri Ram JCA:

(1) The criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of an appellate court to receive further evidence. What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing the appeal that if the trial judge had had the further evidence before him, he may, or even would, have come to a different conclusion. But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party’s case will very much depend on the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes, the exercise of discretion would very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court (*Yah Aji v. Fatimah Hj Mohamed Arifin & Ors* (not foll)). In civil

- A proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed and a trial judge must be given a wide discretion on matters relating to evidence (*Ong Yoke Eng & Anor v. Lim Ah Yew* (foll)). (paras 6, 7 & 8)
- B (2) This was a case in which the judge had given no reasons for exercising her discretion in the way in which she did; thus, the role of this court was much wider than in the usual discretion case where reasons are given, enabling it to look at all the facts and see how a reasonable tribunal would have acted.
- C There was no question that a reasonable tribunal would have rejected the defendants' illogical suggestion and proceeded to deal with the plaintiff's application to reopen his case at the time before the defendants began their defence. A reasonable
- D tribunal would have had the interests of justice as the overriding consideration in its mind and taken into account the principle that that as far as is possible a litigant should not be punished for the error of his or her counsel. In that state of affairs, a reasonable tribunal armed with all the relevant
- E material that was before the trial judge would have permitted the plaintiff to reopen his case, especially so as the defendants would have suffered no real prejudice in real terms by the grant of the application. Time and costs would also have been saved and the trial could have been proceeded with smoothly.
- F (para 14)
- (3) The words "tea money", in the Malaysian context, were indeed capable of bearing a defamatory meaning because they connote a solicitation of a bribe and hence dishonesty. Since the plaintiff's counsel had managed to obtain an admission from the defendants' witness that the plaintiff had asked for "tea money", that was sufficient proof of the plaintiff's averment that those words had been attributed to the plaintiff. In a civil case, one party's evidence is the other's as well and a plaintiff may rely on the defendant's evidence to prove his or her case, and *vice versa*. (paras 3 & 16)
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Bahasa Malaysia translation of headnotes

Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi kerana menolak tuntutan fitnahnya terhadap defendan-defendan. Defendan-defendan telah menyiarkan satu artikel tentang plaintif, seorang penjual surat khabar, dalam bahasa Cina yang menurut plaintif menyatakan bahawa plaintif telah meminta “duit teh” untuk mengedar surat khabar defendan kedua. Plaintif mengatakan artikel tersebut telah memfitnahnya dan berikutnya membuat tuntutan ganti rugi kerana libel. Di perbicaraan, plaintif telah menutup kes setelah memberikan keterangannya, tanpa memanggil sebarang saksi bagi membuktikan kandungan artikel yang dicabar di dalam bahasa mahkamah, iaitu sama ada dalam Bahasa Malaysia atau Inggeris. Menyedari kesilapannya, plaintif memohon untuk membuka semula kesnya. Defendan-defendan, bagaimanapun, mencadangkan supaya defendan-defendan dibenarkan meneruskan dahulu, iaitu dengan memberi keterangan-keterangan dan menutup kes mereka, dan sesudah itu plaintif bolehlah memfailkan usul secara formal untuk membukakan kesnya. Agak mengejutkan, kedua-dua plaintif dan mahkamah telah menerima cadangan defendan-defendan ini, tanpa menyedari ketidakadilan serius yang akan ditanggung oleh plaintif. Ianya bermakna bahawa plaintif terhalang dari mengemukakan kes berkaitan maksud sebenar perkataan “duit teh” kepada saksi-saksi defendan, sepertimana yang sebenarnya telah berlaku. Setiap kali plaintif bertanya mengenai maksud perkataan-perkataan di dalam artikel yang dikatakan memalukannya, defendan-defendan telah membangkitkan bantahan yang kemudian dibenarkan oleh hakim bicara. Walaupun begitu, sewaktu pemeriksaan balas, plaintif berjaya memperoleh pengakuan dari saksi defendan bahawa plaintif telah meminta “duit teh”. Di penutup kes plaintif, peguam plaintif memohon melalui satu notis usul rasmi untuk membuka kembali kes plaintif dan memanggil jurubahasa bagi membuktikan kandungan artikel yang dicabar. Defendan-defendan membantah dan yang arif hakim menolak permohonan plaintif tanpa memberi sebarang sebab. Hujah defendan-defendan, yang diulangi di mahkamah ini, adalah bahawa, seseorang plaintif yang hendak membuka semula kesnya hendaklah memenuhi ketiga-ketiga syarat seperti yang dibentang oleh Denning LJ dalam *Ladd v. Marshall*.

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A Diputuskan (membenar rayuan dan memerintahkan perbicaraan semula)

Oleh Gopal Sri Ram HMR:

- B** (1) Kriteria bagi membenarkan pihak di suatu perbicaraan untuk membuka semula kesnya bagi maksud memanggil semula saksi atau mengemukakan keterangan baru adalah sangat berbeza dari kriteria yang mengawal bidangkuasa sesebuah mahkamah rayuan untuk menerima keterangan lanjut. Apa yang harus dibuat oleh orang yang memohon untuk mengemukakan keterangan lanjut di peringkat rayuan adalah menyakinkan mahkamah yang mendengar rayuan bahawa, sekiranya hakim bicara mempunyai keterangan lanjut tersebut, ia mungkin, malah tentunya akan mencapai suatu keputusan yang berbeza. Tetapi ini bukanlah kedudukannya di perbicaraan di sini. Ini kerana, bercakap dari segi masa, sama ada hakim bicara akan melaksanakan budibicaranya dan membenarkan pembukaan semula kes sesuatu pihak amat bergantung kepada di peringkat mana permohonan tersebut dibuat. Budibicara sedemikian berkemungkinan akan dilaksanakan jika permohonan dibuat sebaik sahaja pihak yang memohon menutup kesnya.
- C** Budibicara, bagaimanapun, mungkin tidak dilaksanakan di mana permohonan dibuat selepas defendan-defendan menutup kes mereka dan sejurus sebelum hakim bicara memberikan keputusannya. Melaksanakan budibicara pada fakta yang
- D** berbagai-bagai yang wujud di antara dua keadaan ekstrim ini pula banyak bergantung kepada di mana terletaknya keadilan kes, mengambil kira fakta dan halkeadaan semasa yang ada di hadapan mahkamah (*Yah Aji v. Fatimah Hj Mohamed Arifin & Ors* (tidak diikuti)). Di dalam prosiding sivil, soal memanggil semula saksi atau saksi-saksi selepas kes ditutup adalah
- E** merupakan budibicara mahkamah awalan, dan hakim bicara harus diberikan budibicara yang luas mengenai hal yang berkaitan dengan keterangan. (*Ong Yoke Eng & Anor v. Lim Ah Yew* (diikuti)).
- F** (2) Ini adalah kes di mana hakim tidak memberi sebarang alasan atas pelaksanaan budibicara sepertimana yang dilaksanakan beliau; oleh itu, tugas mahkamah ini adalah lebih luas daripada kes pelaksanaan budibicara biasa di mana alasan-alasan telah diberi, sekaligus membenarkan mahkamah ini melihat kepada
- G** fakta-fakta dan menentukan bagaimana sebuah tribunal yang munasabah akan bertindak. Tidak syak bahawa sebuah tribunal yang munasabah akan menolak cadangan defendan-defendan
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yang tidak logik tersebut dan akan sebaliknya menangani permohonan plaintif untuk membuka semula kesnya sebelum defendan-defendan memulakan pembelaan mereka. Sebuah tribunal yang munasabah akan mengambil kepentingan keadilan sebagai pertimbangan utamanya, dan seterusnya mempertimbang prinsip bahawa seseorang litigan, selagi mungkin, tidak harus dihukum atas kesilapan yang dilakukan oleh peguamnya. Dalam halkeadaan sedemikian, sebuah tribunal yang munasabah, dengan berbekalkan segala fakta yang ada di hadapan hakim bicara, akan membenarkan plaintif untuk membuka semula kesnya, sementelah apabila defendan-defendan tidak menanggung sebarang prejudis akibat pembenaran permohonan tersebut. Masa dan kos juga boleh dijimatkan dan perbicaraan boleh berjalan dengan lancarnya.

- (3) Dalam konteks Malaysia, perkataan “duit teh” sungguhnya boleh membawa maksud yang memalukan kerana ia bermakna meminta rasuah dan kerana itu perbuatan tidak jujur. Oleh kerana peguam plaintif telah berjaya mendapatkan pengakuan dari saksi defendan bahawa plaintif sememangnya telah meminta “duit teh”, maka terdapat bukti yang mencukupi tentang dakwaan plaintif bahawa perkataan tersebut telah dikaitkan kepadanya. Dalam suatu kes sivil, keterangan oleh satu pihak adalah juga keterangan pihak yang lain, dan plaintif boleh bergantung kepada keterangan defendan bagi membuktikan kesnya, dan begitu juga sebaliknya.

Case(s) referred to:

- Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41 (*refd*)
Doyle v. Olby (Ironmongers) Ltd [1969] 2 All ER 119 (*fol*)
Ladd v. Marshall [1954] 3 All ER 745 (*refd*)
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 (*refd*)
Lubrizol Corp v. Imperial Oil Ltd 62 ACWS (3d) 902 (*fol*)
M Mahadevan v. S Lourdenadin [1988] 1 CLJ 601; [1988] 1 CLJ (Rep) 168 SC (*refd*)
Ng Hong Choon v. Timbalan Hal Ehwal Dalam Negeri & Anor [1994] 4 CLJ 47 SC (*dist*)
Ong Yoke Eng & Anor v. Lim Ah Yew [1982] 1 MLJ 226 (*fol*)
Pernas Trading Sdn Bhd v. Senali Construction Works Sdn Bhd [1991] 2 CLJ 1587; [1991] 3 CLJ (Rep) 439 SC (*refd*)
PP v. Boo Chew Hia [1963] MLJ 33 (*refd*)
Shedden v. Patrick [1869] LR 1 HL Sc 470 (*refd*)

- A *TD Canada Trust v. McMaster et al* [2003] BCD (Civ) 16394 (**fol**)
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA
(**fol**)
Yah Aji v. Fatimah Hj Mohamed Arifin & Ors [1969] 2 MLJ 186 (**not fol**)

Legislation referred to:

- B Evidence Act 1950, ss. 136(1), 138(4)
For the appellant - PS Ranjan (A Kailesh with him); M/s Kailesh Aru & Co
For the respondents - Mubashir Mansor (Ahmad Feisal Ahmad Rosli with
him); M/s Skrine
- C [Appeal from High Court Malaya, Kuala Lumpur; Suit No: S4-23-116-93]
Reported by Suresh Nathan

D **JUDGMENT**

Gopal Sri Ram JCA:

- E **[1]** This is the plaintiff's appeal against the judgment of the High Court dismissing his claim for damages for an alleged libel committed on him by the defendants. The appeal was allowed and a retrial ordered at the close of arguments. Two points were argued: one procedural; the other substantive. I will deal with each. But first here are the facts.
- F **[2]** The plaintiff was a newspaper vendor. He distributed Chinese newspapers. One of the newspapers he distributed was the "Sin Chew Jit Poh". It was published by the second defendant. The first defendant was the paper's chief editor. The newspaper sold for 60 sen a copy and the plaintiff received a commission of 18 sen. Later, the second defendant introduced a coupon system to replace the payment of commission. Apparently it was financially less advantageous than the commission system. The plaintiff was unhappy. He asked to be compensated. The defendants published an article about the plaintiff. It was in the Chinese language. In other words, it was in a foreign language, that is to say, in a language other than the language of the court. The plaintiff's case is that the second defendant's article had alleged that the plaintiff had asked for "tea money" to distribute the second defendant's newspaper. He said it was defamatory of
- I him. He brought an action claiming damages for libel.

[3] Eventually, the plaintiff's action came on for trial. What transpired at that trial constitutes the procedural point. Here is how it emerged. The plaintiff called his evidence and then closed his case. Nowhere during his case did the plaintiff call a witness to prove the contents of the impugned article in the language of the court. That would have been either in the English language or Bahasa Malaysia. Just after he had closed his case, counsel for the plaintiff realised his error. He applied to reopen the plaintiff's case to call the translator. At that point in time counsel for the defendants made a singularly unhelpful, unwise and erroneous suggestion that was proven to be seriously prejudicial to the plaintiff's case. He said that the defendants should be permitted to open, present their evidence and then close their case and that the plaintiff should then file a formal motion to reopen his case. Surprisingly counsel for the plaintiff accepted this suggestion. So did the court. Counsel for the plaintiff and the court probably did not realise the serious injustice the plaintiff was bound to suffer by the course suggested by the counsel for the defendants. It meant that the plaintiff would be precluded from putting his case on the true meaning of the words "tea money" to the defendants' witnesses. And that is precisely what happened. On each occasion that counsel for the plaintiff asked about the defamatory meaning of the words appearing in the article, counsel for the defendants raised an objection which was upheld by the trial judge. But, entirely to the credit of the plaintiff's counsel, he managed, during cross examination, to obtain an admission from the defendants' witness that the plaintiff had asked for "tea money". That in my view was sufficient proof of the plaintiff's averment that those words had been attributed to the plaintiff. In a civil case, one party's evidence is the other's as well. So, a plaintiff may rely on the defendant's evidence to prove his or her case. The converse is also true. See, the observations of Hashim Yeop A Sani SCJ in *M Mahadevan v. S Lourdenadin* [1988] 1 CLJ 601; [1988] 1 CLJ (Rep) 168.

[4] At the close of the plaintiff's case, his counsel applied by way of a formal notice of motion to reopen his client's case and to call the translator to formally prove the contents of the impugned article. That application was opposed by the defendants and dismissed by the court. No reasons have been given by the learned judge for refusing the plaintiff's application. But we have the benefit of the note of the defendant's argument. It is an

- A argument that was repeated before us. The defendants say that a plaintiff who wishes to reopen his case must satisfy the three conditions laid down by Denning LJ in *Ladd v. Marshall* [1954] 3 All ER 745. These were set out by Suffian FJ (later Lord President) in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 as follows:

This is an application for an order that the plaintiff/appellant be at liberty **upon the hearing of his appeal to adduce further evidence.**

- C To justify the reception of this evidence three conditions must be fulfilled:

First, it must be shown that the evidence could not have been obtained with reasonable diligence **for use at the trial;**

- D Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;

Third, **the evidence must be such as is presumably to be believed,** or in other words, it must be apparently credible, although it need not be incontrovertible. (emphasis added.)

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- [5] In support of his submission, counsel for the defendants relied on two authorities. The first of these is *Yah bte Aji v. Fatimah bte Hj Mohamed Arifin & Ors* [1969] 2 MLJ 186. That was an action concerning the ownership of land. The defendant, after she had had closed her case, applied to call further evidence. Plaintiff's counsel objected but – to quote from the judgment – “otherwise produced no authority in support of his opposition”. This is an important feature of that case. Because, the views expressed by the learned judge on the issue of re-opening by a party of his or her case were not the product of sufficient assistance from counsel. In the very difficult position in which the learned judge found himself in that case he did the best he could and applied *Ladd v. Marshall*. Here is the passage on which reliance was placed by counsel for the defendants in the present appeal:

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- After due consideration, I take the view that if under certain conditions, **further evidence** was allowed to be adduced on appeal, such evidence **should under the same conditions be adducible at the hearing in the first instance, even though the side seeking to adduce such evidence had closed its case.** An appeal is always by way of rehearing and if such evidence is let
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in at the appellate stage where the case is being reheard, I for one can see no justification for its exclusion when the case is being heard.

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These conditions have been stated in many authorities. I take the statement of Denning LJ (as he then was) in the case of *Ladd v. Marshall* [1954] 1 WLR 1489 (at page 1491) as being, with respect, the most succinct:

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To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

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[6] With respect, I am unable to accept the reasoning of the learned judge in the foregoing passage. In my judgment, the criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of an appellate court to receive further evidence. Indeed they cannot be the same as I shall try to demonstrate. In the first place, although an appeal is, as observed by the learned judge in *Yah bte Aji*, by way of rehearing, there are important constraints on an appellate court. See, *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41, at p. 42. Such constraints include the deference given by an appellate court to the audio-visual advantage enjoyed by the trial court. These constraints are absent at a trial. The trier of fact is yet to see and hear the witness whose evidence it is sought to be adduced by a re-opening of the case. In the second place, the issue on an application to adduce further evidence before an appellate court is whether the party seeking to adduce it could not by reasonable diligence have obtained it for use at the trial. This does not enter at all into the equation before the trial court. In the third place, an application to adduce further evidence before an appellate court is temporally fixed. That is to say, it is fixed at the point when all the evidence is in and the submissions are over and more importantly, the trial judge has pronounced his views on the evidence before him. What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing

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- A the appeal that if the trial judge had had the further evidence before him, he may, or even would, have come to a different conclusion. But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on
- B the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and
- C just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before
- D the court.

[7] In contradistinction to the decision in *Yah bte Aji, Arulanandom J in Ong Yoke Eng & Anor v. Lim Ah Yew* [1982] 1 MLJ 226 held (so far as is material to the present instance) that:

- E In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed. Although under ordinary circumstances it may not be necessary or permissible ... unforeseen situations may develop and there may be also inadvertent omissions.

- F **[8]** In my judgment, the better view is that expressed in *Ong Yoke Eng*. A trial judge must be given a wide discretion on matters relating to evidence. After all, the Evidence Act 1950 itself places the matter of relevance and therefore admissibility upon the court, for it provides as follows in s. 136(1):
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- (1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved,
- H would be relevant, and not otherwise.

[9] The view I have taken is supported by the decision in *TD Canada Trust v. McMaster et al* [2003] B.C.D. (Civ) 16394, where Garson J said:

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In *Dudas v. Munroe* [1993] B.C.J. 2035 (S.C.) (Q.L.), Braidwood J (as he then was) summarised the law concerning the court's discretion to re-open a trial before judgment is entered as follows:

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In deciding whether or not to re-open a case, the governing considerations are first, would a miscarriage of justice probably occur without a re-hearing; and second, would a re-hearing probably produce a change of result?

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The discretion to re-open a trial before judgment is entered is an unfettered discretion but one that should be used sparingly (*Sykes v. Sykes* [1995] 6 B.C.L.R. (3d) 296 CA) and has as its purpose the correction of what would otherwise be a miscarriage of justice (*Kemp v. Wittenberg*, 1999 B.C.J. 810 S.C.).

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[10] Again in *Lubrizol Corp. v. Imperial Oil Ltd.* 62 A.C.W.S. (3d) 902, the Federal Court of Appeal of Canada (Stone, Linden and McDonald JJA) when dealing with the point under discussion said (in the joint judgment of Stone and Linden JJA):

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Save in exceptional circumstances, a litigant who has had a full opportunity of adducing evidence at trial will not be permitted to reopen his case so as to allow new evidence to be introduced after the judgment at trial. (*Becker Milk Co. Ltd. et al. v. Consumers' Gas Co* [1974] 2 OR (2d) 554 (CA)). It has been well observed that as under our adversary system of justice, 'what witnesses are called and what questions they are asked is a matter left to counsel' and it is counsel who 'makes decisions, both strategic and tactical, as to what approach will be taken ... counsel cannot later complain about the absence of evidence at trial.' (*International Corona Resources Ltd. v. LAC Minerals Ltd* [1988] 66 OR (2d) 610. The case at bar, it seems to us, does present a somewhat unusual situation. It is not the normal case where all of the issues are defined by the pleadings and there has been full discovery of documents and of witnesses on the issues so defined in advance of the trial. Nor is it a case where a party seeks to reopen after the trial has ended and judgment has been pronounced by the trial judge on the issue to which the new evidence relates.

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It is a long-standing principle that *the object of courts is to decide the rights of the parties in litigation and not to punish for mistakes made in the conduct of a case unless the circumstances be exceptional*. That principle was expressed in the following way by Bowen LJ in *Cropper v. Smith* [1884] 26 Ch. D 700 (CA), at p. 710:

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- A Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

- C While Bowen LJ wrote in dissent of how the particular case ought to be decided, the principle, in our view, remains good law. (See *Shoe Machinery Company v. Cutlan* ([1896] 1 Ch. 108 (CA), at p.p. 112, 115; *The Supreme Court Practice* 1993, Vol. 1, Part I (London: Sweet & Maxwell, 1992), at pages 371-372). The case itself was concerned with whether a pleading should be amended on an appeal, and while the principle is of particular relevance in cases involving amendment of a pleading it has received broader application. Thus in *Wood v. British Columbia Electric Railway Company Limited* [1925], 34 BCR 527 (SC), at p. 530, it was applied in rejecting an argument put forward at the end of a trial that the plaintiff could not recover damages because he was not the proper party to the action. (emphasis added.)

- E [11] To what their lordships said in *Lubrizol Corp* I would add the words of Lord Denning MR in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 All ER 119 which we applied in *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553:

- G Whenever possible, where there is no risk of sacrifice of principle in the name of justice or at the altar of convenience, we do our best to ensure that a lay client does not suffer because of the mistake of his legal advisers. We do so in the interest of justice. When we act, we always bear in mind what Lord Denning said in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 All ER 119 at p 121:

- H We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of evidence, in which case we can at best order a new trial.

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We have intervened where counsel makes an erroneous admission of law. See, *Lee Hock Ning v. Government of Malaysia* [1972] 2 MLJ 12. But it is not possible where our decision would be in defiance of established principle or where an injustice visited upon the other side. See *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705.

[12] The other authority relied on by the defendants is *Ng Hong Choon v. Timbalan Hal Ehwal Dalam Negeri & Anor* [1994] 4 CLJ 47. That was a *habeas corpus* case in which the High Court admitted corrective and additional evidence by means of supplementary affidavits exhibiting documents tendered by the respondents after the detenu's counsel had closed his case and commenced his submissions. It was held that the affidavits were wrongly admitted. Wan Yahya SCJ when delivering the judgment of the Supreme Court said:

It would suffice if we were to reiterate the principle that the admission of such evidence is only confined to circumstances where the evidence sought to be adduced is raised *ex impromptu* or that such evidence was not available with reasonable diligence at the time when the evidence of both parties had been closed. See *Yah bte Aji v. Fatimah bte Haji Mohamed Ariffin & Ors* [1969] 2 MLJ 186; *Kesarmal & Anor v. Valliappa Chettiar* [1954] MLJ 119; *Balfour v. PP* [1949] MLJ Supp 8; *R v. Day* [1940] 1 All ER 402; *Ladd v. Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489.

[13] *Ng Hong Choon* is readily distinguishable. That was a case in which corrective affidavits were put in after the detenu's counsel had commenced his submissions. That is not the case before us. Here, the application was initially made by the plaintiff at the close of his case. If defendants' counsel had been less helpful than he was, the judge would have ruled on that application. But, the defendants having misunderstood the law misled themselves, their opponent and the court albeit with no ill intention. Should they be allowed to benefit from the harm they caused? I think the answer to that question is quite obviously, "No". The second point about *Ng Hong Choon* is this. It was a case concerning the liberty of the subject. Upon an issue of such importance courts adopt a most strict approach. For those who seek to deprive an individual of his or her freedom must justify that deprivation upon the clearest of grounds and the law affords them no leeway, no flexibility to manoeuvre themselves into a better position than that

A in which they found themselves by a breach of the practice concerning the delivery of evidence. That this was indeed the overriding consideration comes across from the following passage in the judgment of Wan Yahya SCJ:

B We consider that in a motion for a *habeas corpus* application which is normally heard on affidavit evidence, *the general principle of practice requires that both parties file their affidavits within such time as the court may allow – which is usually two days before the date of hearing.* It is only at the conclusion of the pleadings or in our present motion, at the close of the evidence that the court
C proceeds to hear the submissions and make a finding by due consideration of affidavit evidence to determine the truth of the point in issue raised by the parties.

In this case, the last affidavit was filed by the respondents on 24 December 1990, two days before the date fixed for hearing. Obviously the time for accepting affidavit evidence had been closed two days before the hearing date, ie on 24 December 1990, when the respondents' last affidavit was filed and as there was no indication by the appellant to file any reply to the respondents' affidavit, the court had proceeded to consider the merit of the motion on 26 December 1990 on the
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E *fundamental ingredient of all the affidavit evidence before it.*

On the basis of the affidavit evidence, as recorded, and as it stood before the court at the hearing on 26 December 1990, it cannot be disputed that the defect in PPKP Osman's affidavit in failing to specify the actual date on which the report had been submitted to the Minister was fatal on the authority of *Tan Yap Seng v. Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 which was confirmed by the Supreme Court by the time the adjourned application of the applicant came up for hearing. (emphasis added.)
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G So, you can see, that that was really a case of late delivery of affidavit evidence in a human rights case.

[14] Counsel for the defendants argued that the trial judge having exercised her discretion not to permit the plaintiff to reopen his case, we should not interfere with her discretion. But what
H counsel overlooks is that this is a case in which the judge has given no reasons for exercising her discretion in the way in which she did. So we cannot really gauge what it is that operated on her mind when she dismissed the plaintiff's application to reopen
I his case. This is accordingly a stronger case than one in which reasons are given. Were it otherwise, a judge at first instance will

be able to insulate the exercise of his discretion from review by giving no reasons at all. That is not and cannot be justice according to the law. Our role, I think, is much wider in this case than in the usual discretion case where reasons are given. Here we can look at all the facts and see how a reasonable tribunal would have acted in their face. And there is no question that a reasonable tribunal would have rejected the defendants' illogical suggestion and proceeded to deal with the plaintiff's application to reopen his case at the time before the defendants began their defence. A reasonable tribunal would have had the interests of justice as the overriding consideration in its mind and taken into consideration the principle that that as far as is possible a litigant should not be punished for the error of his or her counsel. In that state of affairs, a reasonable tribunal armed with all the relevant material that was before the trial judge would have permitted the plaintiff to reopen his case. Especially so as the defendants would have suffered no prejudice in real terms by the grant of the application. Also time and costs would have been saved. And the trial could have been proceeded with smoothly.

[15] At the conclusion of arguments my learned brothers and I were satisfied that an injustice was occasioned to the plaintiff by the court acceding to the defendants' suggestion. Look at how clumsily the trial proceeded because of what had happened. As I have already said, the plaintiff's cross examination of the defendants' witnesses was hampered. And what would have happened assuming that the judge had allowed the plaintiff's application to reopen his case after the defendants had closed their case and permitted him to call his evidence? It would have meant the defendants reopening their case and the plaintiff having to re-cross-examine the defendants' witnesses all over again. With respect, I cannot think of a more cumbersome, expensive and confusing way of conducting a trial.

[16] With that I turn to consider the substantive point. It is quite short. The issue is whether the allegation that the plaintiff asked for "tea money" is capable of bearing a defamatory meaning. I am in agreement with the observation made by my learned brother Azmel bin Haji Maamor, JCA during argument that those words – "tea money" – in the Malaysian context are indeed capable of bearing a defamatory meaning because they connote a solicitation of a bribe and hence dishonesty. Counsel for defendant, in response to my learned brother repeated the point he had already

- A made, namely, that the plaintiff had failed to prove the translation. And, as I have already pointed out earlier in this judgment, the answer to counsel lies in the answers given under cross-examination by his clients' witness. I do not think it serves much purpose to say anything more on this subject by reason of the
- B orders we made on the appeal.

- [17] Having regard to the procedural injustice that the plaintiff suffered in the circumstances of this case, an order of re-trial was the most appropriate to make. Defendants' counsel opposed a
- C retrial on all issues because one of his witnesses who gave evidence at the first trial is dead. He says that a full re-trial would occasion an injustice to his clients. But I think it is hardly open to him to complain. After all he is the author of the difficulties that were visited upon the plaintiff's head. I may say here that given
- D the fact that the court was moved after the defendants had closed their case (as suggested by counsel for the defendants) it comes as no surprise that the trial judge was minded to dismiss the application. It would have meant unravelling quite a bit of the defendants' case by ordering the recall of their witnesses. As I
- E said, it would have been rather clumsy. It may well have been different if the plaintiff's application had been heard at the close of his case. In that event, the balance of justice would plainly have turned in the plaintiff's favour as what he was trying to do was to remedy his counsel's oversight in not calling the translator.

- F [18] One last point. Counsel for the defendants made a sustained submission on the discretion of a judge to permit a party to recall a witness after the close of his case. He read to us *Shedden v. Patrick* [1869] LR 1 HL Sc 470 and *Pernas Trading Sdn Bhd v. Senali Construction Works Sdn Bhd* [1991] 2 CLJ 1587; [1991] 3
- G CLJ (Rep) 439 which are authorities for the proposition that the court must be slow to permit the recall of a witness after the cases of both parties have concluded. I accept, of course, that the power to permit the recall of a witness is in the discretion of the court as provided by s. 138(4) of the Evidence Act 1950 which
- H reads:

- (4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further
- I cross-examination and re-examination respectively.

But if I may say, with respect, all this has nothing whatsoever to do with the present case. If you look carefully enough, you will see that the plaintiff was not applying to recall his witness. The witness he wanted to call had not given evidence as yet. In other words he wanted to call a witness and not to recall a witness already called. The point appears to have escaped the defendants. In any event, the principle as to the recall of witnesses is the same in both civil and criminal cases. And all I really need do is to quote from the judgment of Ali J (as he then was) in *Public Prosecutor v. Boo Chew Hia* [1963] MLJ 33:

The law permits a witness to be recalled whenever it is essential to the just decision of the case. Merely recalling a witness is not in itself an irregularity.

[19] For the reasons already given the appeal was allowed and a retrial was ordered. All costs incurred up to date, including the costs of the first trial, were directed to follow the event of the retrial. The deposit was ordered to be refunded to the appellant.

[20] My learned brothers Hashim bin Dato' Mohd Yusoff and Azmel bin Haji Maamor, JJCA have seen this judgment in draft and have expressed their agreement with it.

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